

Supreme Court, U.S.
FILED

SEP 15 1979

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-281

Marcus A. Arnheiter,

Petitioner,

vs.

Neil Sheehan, Random House, Inc., and
National Broadcasting Company, Inc.,

Respondents.

Marcus A. Arnheiter,

Petitioner,

vs.

Dell Publishing Co., Inc., Neil
Sheehan, and Random House, Inc.,

Respondents.

Donald M. Brownlow,

Petitioner,

vs.

ABC Corporation, National Broadcasting
Company, Inc., Random House, Inc., Double-
day & Co., Inc., Dell Publishing Co., Inc.,
Raritan Enterprises, Inc., Johnny Carson
and Neil Sheehan,

Respondents.

**Motion For Order To Correct Petition For
Writ of Certiorari Docketing Date or in the
Alternative For One Day Extension Of Time, and
Affidavit and Brief In Support Thereof**

Leon S. Wolk

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<u>Index</u>		Pages
Statement of Facts,.....		1-4
Argument		
Point I,.....		5
THE CLERK OF THE COURT		
IS ESTOPPED TO DENY THE		
TIMELINESS OF THE FILING		
OF PETITION AS OF AUGUST		
16,1979,AND THIS COURT		
SHOULD SO ORDER		
Point II,.....		10
THIS COURT HAS THE		
JURISDICTION IN A CIVIL		
ACTION TO GRANT AN		
EXTENSION OF TIME		
WITHIN WHICH TO FILE		
PETITION FOR WRIT OF		
CERTIORARI SUBSEQUENT		
TO DUE DATE,AND SHOULD		
SO ORDER, IN THE INSTANT		
PETITION		
Affidavit,.....		I-VII
"A"		VIII
"B"		IX
"C"		X
List of Authorities Cited		
American Farm Lines v. Black Ball		
397 U.S.532,		11
Branch Banking & Trust Co v.		
United States, 98 F. Supp.757.		10
Citizens Bank v. Oppermann		
398 U.S. 58,		10
Department of Banking v. Pink,		
317 U.S. 264,		10

	Pages
Janesville Hay Tool Co. v.	
Boyd, 13 S.E.381,35 W. Va 240,.	6
Helena First Nat. Bank v.	
Batchelder Egg Case Co.,	
51 Fed 137,	6
Moser v. United States,	
341 U.S. 41,.....	9
Matton Steamboat Co. v. Murphy,	
319 U.S. 412,	10
Pacific Far East Lines Inc. v.	
United States,394 F.2d 990,....	9
People v. Fletcher, 3 Ill 482,	6
People's Sav. Bank etc. Co. v.	
Batchelder Egg Case Co,	
51 Fed 130,	6
Re Petition of LaVoie,349 F.Supp.68,.	9
Schact v. United States,	
398 U.S. 58,	11
Schuster v. Commissioner,	
312 F.2d 311,	10
Smale & Robinson, Inc. v.	
United States, 123 F. Supp. 457,.	10
Walsonavich v. United States,	
335 F.2d 96,	9
Others :	
18 U.S.C. 3772,.....	11
28 U.S.C. 452,	5
28 U.S.C. 2101(c),	10,11
Rule 1, 28 U.S.C., Rules of the	
Supreme Court,	5
Rule 2, 28 U.S.C.,	5
Rule 23(3), 28 U.S.C.,	12
Rule 34(2), 28 U.S.C.,	11
Equity Jurisprudence, Pomeroy 5th ed,..	9
Supreme Court Practice, Fifth Ed.	
Stern, R.L., Gressman, E. The Bureau	
Of National Affairs Inc. Wash. D.C.	
1978, p. 418,	7

Petitioners move the Court for an order to correct petition for writ of certiorari docketing date, from August 17, 1979, as indicated by the Clerk, to August 16, 1979, when at about 11:30 P.M. receipt was acknowledged by Federal Court security guard. Acknowledgement of receipt had been stamped on the original of said petition and a file copy, both upon the caption page (see schedule "A" annexed to affidavit in support of within motion) and on file copy of letter of enclosure to Clerk and the respondents' attorneys (see schedule "B" annexed to affidavit aforesaid).

The final day within which to file said petition was August 16, 1979 and service upon respondents' attorneys was made by mail delivered on time to the main office in Washington D.C. (see schedule "C" annexed).

At the same time that the required number of copies of said petition were being served by mail upon the attorneys for respondents, by petitioner Marcus A. Arnheiter, his attorney, Leon S. Wolk was to deliver a package containing original and thirty nine copies of said petition, letter of enclosure and filing fee check to the Clerk.

Wolk and petitioner, having experienced some mechanical problem with duplicating facilities in New Jersey, elected to travel to Washington D.C. to complete the remaining one half, yet undone. They arrived at the Union Station in Washington D.C. and advised by telephone conversation, Jennie H. Lazowski, assistant to the Clerk of the need for a one day extension of time, because the completion of duplication would require time beyond 5:00 P.M.. She

advised that, until 12:00 midnight, timely filing could be had by delivering the required number of copies of the petition and filing fee to a duty security guard for the court who would acknowledge receipt. At about 11:30 P.M. on August 16, 1979 this was done. It was not until August 17, 1979, that Wolk was advised, that he had delivered same, to a security guard for the court, who had advised orally and in writing (see schedule "A" and "B" annexed to affidavit and signed original caption page of petition in Clerk's possession) to the effect that he had authority to receive same for the Supreme Court of the United States. Compare affidavit annexed. In response to Wolk's questions, if the guard had advised that he could not receive petitions on behalf of this Court, enough time remained to deliver same on August 16, 1979 to a security guard in the

Supreme Court building, rather than in a different Federal Court building located in Washington D.C. where the delivery was actually made, in detrimental reliance of representations to the contrary. The Clerk should be estopped to deny the filing of said petition as of August 16, 1979. The Clerk upon review of said petition, accepted same on the next day, in accordance with established custom regarding after hours filing, however contrary thereto, acknowledged same, not as of August 16, but as of August 17, 1979.

Under the circumstances, and to prevent **injustice**, this Court should enter an order to correct the filing date to August 16, 1979, within time as provided by Court Rules, Statutes and case law, or in the alternative this Court grant a one day extension of time, until August 17, 1979.

Brief of Law

I THE CLERK OF THE COURT IS
ESTOPPED TO DENY THE TIMELINESS OF
THE FILING OF PETITION AS OF AUGUST
16, 1979 AND THIS COURT SHOULD SO ORDER.

Rule 1, 28 U.S.C. provides;

"1. The clerk of this court shall
reside and keep the office at the
seat of the National Government,
..."

"2. The clerk's office will be
open from 9:00 A.M. to 5:00 P.M.
Mondays through Fridays,..."

28 U.S.C. 452 provides;

"All courts of the United States
shall be deemed always open for the
purpose of filing proper papers..."

Included within the definition of
"courts of the United States" are the
Supreme Court of the United States and
district courts. Washington D.C. is "the
seat of National Government" and there is
no provision of either the statutes or the
Rules of this Court that restrict the Clerk

to the physical confines of the actual
building wherein this Court is located.
Absent a statutory regulation, the Clerk,
may, but need not, perform official duties
away from his office, provided it is
within Washington D.C..

A ministerial act, such as the filing
of papers, is not void, although performed
away from his office. People v. Fletcher,
3 Ill. 482 where a bond was filed and
received outside of the court. See also,
Janesville Hay Tool Co. v. Boyd, 13 S.E.
381, 35 W. Va. 240, Helena First Nat. Bank
v. Batchelder Egg Case Co., 51 Fed. 137,
138, People's Sav. Bank, etc., Co. v. Batchelder
Egg Case Co., 51 Fed. 130.

Consistent with the courts being
always open for the filing of proper
papers, a custom exists whereby,

"... the Clerk has permitted counsel to perfect a filing after the close of business on the due date. This can be done-and has been done-by leaving the requisite copies of the petition, the filing fee, and other papers with the Supreme Court Building guard inside the ground-level entrance before the midnight hour. The guard will indicate on the package or papers the precise time when they were received and will see that they are transmitted to the Clerk's Office at the opening of business the following morning. Upon request, the guard will provide a signed receipt, giving the time when the papers were delivered. ... no guarantee that the Clerk will accept the papers for filing...."

Supreme Court Practice, Fifth Edition,
Stern, Robert L., Gressman, Eugene, The
Bureau of National Affairs, Inc., Wash. D.C.
1978, p. 418 . In the instant petitions the
Clerk did accept the papers for filing on
the following morning after they had been
received within time by a federal court
security guard, on behalf of the Clerk
of this Court, but in a different court

building located in Washington
D.C..

The Clerk should be estopped to
deny that the filing of petition
and filing fee and letter of transmittal
were all received, on his behalf, on
August 16, 1979 at about 11:30 P.M..
But for the representations by the
security guard that he was authorized to
receive same on behalf of the Clerk of
the Supreme Court of the United States
petitioners' counsel, with motor trans-
portation waiting outside, could have
delivered said petition and filing
fee to the security guard in the
Supreme Court building before August
17, 1979.

The security guard was acting
within the scope of his actual or apparent
authority when his oral and written
representations were relied upon by
petitioners to their detriment.

Pacific Far East Line, Inc. v. United States, 394 F.2d 990, 1003, 184 Ct.Cl. 169, 194(1968). Petitioners should not under these circumstances suffer the injustice of having their petitions dismissed for lack of jurisdiction, merely because of a technical non compliance. In re Petition of LaVoie, 349 F. Supp. 68 (1972). There should be no objection to use of estoppel in the case sub judice since it will benefit only these two petitioners, Arnheiter and Brownlow, and no general public function or property is jeopardized. Also petitioners are not seeking to take advantage of government inaction, but rather, instead have relied on its advice in good faith and to their detriment. Had accurate answers been given to questions the petitions most certainly would have been filed on time in the Supreme Court building. Pomeroy, Equity Jurisprudence, 801-21(5th Ed), Moser v. United States, 341 U.S. 41, where the government was estopped though acting in a sovereign capacity. Walsonavich v. U.S., (CA 3 Pa) 335 F.2d 96,

Smale & Robinson, Inc. v. U.S., (1954 DC Cal) 123 F. Supp. 457, Branch Banking & Trust Co. v. United States, (1951) 120 Ct Cl 72, 98 F. Supp 757 cert. den. 342 U.S. 893, Schuster v. Commissioner, (1962, CA 9) 312 F.2d 311

II- THIS COURT HAS THE JURISDICTION. IN A CIVIL ACTION TO GRANT AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI SUBSEQUENT TO DUE DATE, AND SHOULD SO ORDER, IN THE INSTANT PETITION.

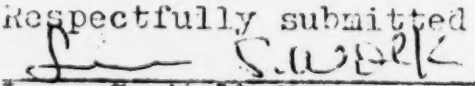
The decisions of this Court draw a distinction between civil cases and criminal cases and a comparison of 28 U.S.C. 2101(c) and Rule 22(1,2,3, and 4), 28 U.S.C.. Compare; Department of Banking v. Pink, 317 U.S. 264, 268, Matton Steamboat Co. v. Murphy, 319 U.S. 412, Citizens Bank v. Opperman, 249 U.S. 448, 450 and Schact v. United States, 398 U.S. 58, 63-64. It should be noted however that 28 U.S.C. 2101 (c) expressly provides for an extension of time not to exceed an additional sixty days for filing petition, without restricting

such extension, to the making of such application, at least ten days, prior to due date. An ambiguity exists between the language of the statute which provides at the same time for a ninety day limitation and extension for an additional sixty days and Rule 34(2), 28 U.S.C. Only the rule of this Court provides that application of extension of time must be prior to expiration of due date. Mr. Justice Harlan's concurring opinion in the Schacht case supra, 398 U.S. at 68 in a criminal case relating to this Court's jurisdiction in the interest of justice to relax its own rules, is also applicable to civil cases. 18 U.S.C. 3772, American Farm Lines v. Black Ball, 397 U.S. 532, 539.

28 U.S.C. 2101(c) expressly restricts the jurisdiction of this Court, regarding civil petitions for a writ of certiorari, but to no more, than one hundred and fifty days, from entry of judgment, without encroaching on this Court's discretion to

grant the time extension, prior or subsequent to, expiration of ninety day period. In the instant petitions, assuming per arguando that the filing was untimely under Rule 22(3) and the doctrine of estoppel is not applicable, all that is needed is an extension of one day in the interest of justice. After seven years of litigation, equity and justice would seem to require that the petitions of Arnheiter and Brownlow be considered on their merits and not dismissed, on a filing technicality of one day, for lack of jurisdiction.

8/31/79

Respectfully submitted

Leon S. Wolk Esq.

Affidavit In Support of Motion

State of New Jersey)
 : ss.
County of Bergen)

Leon S. Wolk Esq., being of full age and duly sworn upon his oath, deposes and says:

1. I am the attorney for petitioners.

2. On August 16, 1979 while completing the duplication and final revision of petition for certiorari with Marcus A. Arnheiter, we experienced a mechanical breakdown in duplicating facilities, after about one half of the complete petition had been completed late in the evening of August 15, 1979. After failing to repair the machine we completed the final revision of the last half of the petition and elected to travel by train to Washington D.C. to complete the duplication. We arrived in the Union Station at about 3:30 P.M. and made arrangements to complete the duplication at a Xerox facility

just outside of Washington D.C.. Before leaving the train terminal, I telephoned the Clerk's office requesting information for obtaining a one day extension of time. I estimated that the duplication could not be completed until after 5:00 P.M. on August 16, 1979. I inquired if it would be possible to file an incomplete petition and file the next day the completed petitions. I was advised at that time in conversation with Coleman Williams and Jennie H. Lazowski in the Clerk's office, that I had to file completed petitions and could not file incomplete petitions. I was also advised that an extension of time application would violate the ten day rule. I was told that I could file before the expiration of the due date if I delivered to the security guard in the court building the forty copies of the completed petition and the one hundred dollar check for filing

fee. before 12:00 : midnight
on August 16, 1979, the due date.

3. Both I and Arnheiter than
went to the Xerox facility located just
outside Washington D.C. to complete
the duplication. The manager advised,
that it would be quicker to duplicate
again the completed first half of the
petitions so as to take advantage of
existing Xerox collating equipment.
This was done and all of the duplica-
tion, binding and assembling work was
completed by about 10:45 P.M.. The
manager suggested that he would drive
us into Washington D.C. in a Xerox
delivery van. To save time Arnheiter
was taken to the Main Post office to
mail three copies each to the three
attorneys for respondents and receive
proof of mailing. ("C" annexed). I was
to be driven to the Supreme Court building

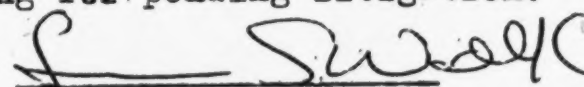
to deliver to the security guard the
signed original and thirty nine copies
of said petition, original letter of
transmittal and filing fee. I told
the Xerox employee to take me to the
Supreme Court building, and he repeatedly
advised that he knew where it was .
The Xerox van stopped outside of a
court house building which I was told
was the Supreme Court building and
I proceeded up some steps and met a
security guard. I asked " Is this where
I file papers for the United States Supreme
Court?" He answered "yes". I told him
that I had a large package of forty copies
of a petition for writ of certiorari
and opened the box and removed the
original petition in which I had placed
my check for one hundred dollars. I showed
him that the original had been signed by
me and asked "Is the check made out
properly" and read to him and showed him

that it was made payable to the United States Supreme Court Clerk. He said " It is correct ". I asked him to stamp the caption cover sheet of the original petition while showing him and reading to him the words " In The Supreme Court of the United States! He stamped it received and I was advised on August 17, 1979 that it was in the possession of the Clerk of this Court together with original letter of transmittal and filing fee check. I had also asked the security guard to stamp my file copy of said letter of transmittal, which he did ("B" annexed) while I again read to him and requested he stamp it close to the address "Office of the Clerk United States Supreme Court, Supreme Court Building, Washington D.C. ". I also asked the security guard to stamp my file copy of the caption cover sheet of said petition, which he did ("A" annexed). The delivery and acknowledged receipts

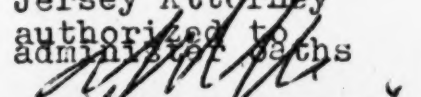
and entire conversation with the court security guard was completed by about 11:30 P.M. on August 16, 1979. The Xerox delivery van and manager and the driver waited outside the court house. Had I been told during my conversation with the security guard that I was not in the Supreme Court building and that he was not authorized to acknowledge receipt for the Clerk of this Court during my repeated references in our conversation, I had ample remaining time to be driven to the Supreme Court building and give to its security guard before midnight of August 16, 1979, the above described package. I relied upon the oral and written representations of the court security guard to the detriment of petitioners. It was not until the morning of August 17, 1979, that I was advised, that I had delivered the petition to a federal court security guard, but not

in the Supreme Court Building. I had several telephone conversations on August 17, and thereafter with Jennie H. Lazowski assistant to the Clerk and on August 21, 1979 with Michael Rodak Jr. Clerk and upon being advised that said petition would be docketed as of August 17, 1979, I objected thereto and advised that I would file the within motion to the entire Supreme Court of the United States.

4. Although admitted to this Court on June 6, 1960 I was a stranger to Washington, D.C. having only been to the Supreme Court building during the day, in 1960 and several years later as a tourist. This was the first time I attempted to go to the building for pending litigation.


Leon S. Wolk Esq.

Sworn and
subscribed 9/1/79
before me a New
Jersey Attorney
authorized to
administer oaths


Yale I. Lazris Esq.
New Jersey Attorney

-VII-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. _____

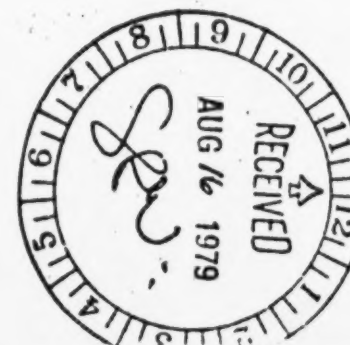
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Raritan Enterprises, Inc., Johnny Carson
and Neil Sheehan,
Respondents.

Petition For A writ Of Certiorari
To The United States Court Of
Appeals For The Second Circuit

Leon S. Wolk
Counsel for Petitioners
31 Wildwood Road
Woodcliff Lake,
New Jersey 07675
(201) 391-9887



(A)

RECEIVED
AUG 16 1979
Jan.

August 16, 1979

Dear Sir,

Armhoelter v Sheoban et. als. 78-7538
Armhoelter v Dell et. als. 78-7539

attorneys for all respondents

Agents for "RCA" "HIG",
Random House Inc.,
Karlton Enterprises Inc.,
Neil Sheehan

350 Madison Ave.
New York, N.Y.

277 Park Ave.

Very truly yours,

Encl. -
LST/AN

P16 9032974

P16 9032972

P16 9032973

RECEIPT FOR CERTIFIED MAIL

RECEIPT FOR CERTIFIED MAIL

**NO INSURANCE COVERAGE PROVIDED —
NOT FOR INTERNATIONAL MAIL**

**NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL**

**NO INSURANCE COVERAGE PROVIDED —
NOT FOR INTERNATIONAL MAIL
(See Reverse)**

[illegible][illegible]

SENT TO	COUDERT Bros	
STREET AND NO	200 PARK AVE	
P.O. STATE AND ZIP CODE	NY NY 10017	
POSTAGE	\$2.73 80c	
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	
	SPECIAL DELIVERY	
	RESTRICTED DELIVERY	
	SHOW TO WHOM AND DATE DELIVERED	
	SHOW TO WHOM, DATE, AND ADDRESS OF RETURN	
	SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	
OPTIONAL SERVICES	RETURN RECEIPT SERVICE	
TOTAL POSTAGE AND FEES	\$3.52	
POSTMASTER'S OFFICE	FOLLY DC MAIN OFFICE	
	16 1979	

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73800, Apr. 1976

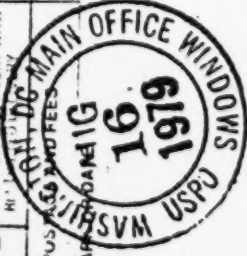
P16 9032973

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO COUDERT BRCS STREET AND NO. 200 PARK AVE P.O. STATE AND ZIP CODE NY NY 10017	
POSTAGE	\$2.72
CERTIFIED FEE	.80
SPECIAL DELIVERY	*
RESTRICTED DELIVERY	*
SHOW TO WHOM AND DATE DELIVERED	*
SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	*
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	*
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	*
OPTIONAL SERVICES	
RETURN RECEIPT SERVICE	
CONSULT POSTMASTER FOR FEES	
TOTAL POSTAGE AND FEES	\$3.52
POSTMASTER'S OFFICE	WASHINGTON, DC

PS Form 3800, Apr. 1976



P16 9032972

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

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CERTIFIED FEE	.80
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RESTRICTED DELIVERY	*
SHOW TO WHOM AND DATE DELIVERED	*
SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	*
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	*
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	*
OPTIONAL SERVICES	
RETURN RECEIPT SERVICE	
CONSULT POSTMASTER FOR FEES	
TOTAL POSTAGE AND FEES	\$3.52
POSTMASTER'S OFFICE	WASHINGTON, DC

PS Form 3800, Apr. 1976



P16 9032974

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO SATERLEE & STEPHENS STREET AND NO. 277 PARK AVE P.O. STATE AND ZIP CODE NY NY 10017	
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CERTIFIED FEE	.80
SPECIAL DELIVERY	*
RESTRICTED DELIVERY	*
SHOW TO WHOM AND DATE DELIVERED	*
SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	*
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	*
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	*
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CONSULT POSTMASTER FOR FEES	
TOTAL POSTAGE AND FEES	\$3.52
POSTMASTER'S OFFICE	WASHINGTON, DC

